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Attorney for Plaintiff
Xand Corporation

UNITED STATES DIST	RICT COURT
SOUTHERN DISTRICT	OF NEW YORK

XAND CORPORATION,

Case# 08-Civ.0513(SCR)

Plaintiff,

Defendant

Judge Robinson

-Against-

Plaintiff's Affidavit in Opposition to Dismissal Motion

STRATEGIC ENERGY, LLC

County of Westchester)

	Dolondant.
State of New York	X
State of New York) ss:

Xand Corporation ("Plaintiff") by its president and CEO Lee S.

Weinstein ("Weinstein") respectfully submits this Affidavit in Opposition

("Opposition") to the defendant's motion to dismiss ("the Dismissal Motion" and/or "Defendant's Dismissal Motion").

JURISDICTION

1. Plaintiff. Xand Corporation (hereinafter "XAND") is a corporation duly organized and existing under the laws of the State of New York, authorized to transact business in the State of New York with its principal office at Hawthorne, New York.

2. In its complaint, plaintiff alleged that the defendant Strategic Energy, L.L.C. (hereinafter "Strategic") at the time the lawsuit was commenced on December 21, 2007 was a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, authorized to transact business in the State of New York and at that time had its principal office in New York at 150 E.52 St. 15th Floor, City, County and State of New York Tel 212-752-6643.

BACKGROUND; COMPLAINT STATES A MERITORIOUS CAUSE OF ACTION

- 3. Plaintiff provides Data Center Services to its customers on a long term contractual basis and electricity is a major component of plaintiff's cost basis.
- 4. The plaintiff entered into a contract signed by plaintiff on November 9. 2005 and countersigned by the defendant on November 16, 2005 for defendant to provide electricity to plaintiff in accordance with the terms of the "Power Supply Coordination Services and Electricity Agreement "(hereinafter "Services Agreement" and/or "PSC Services").
- 5. A copy of such contract signed by plaintiff on November 9, 2005 and countersigned by the defendant on November 16, 2005 is annexed hereto as Exhibit "A,"
- 6. The plaintiff, prior to the execution of the Services Agreement informed defendant of its electrical needs at the demised premises.
- 7. In response, when informed by plaintiff of its electrical needs for the demised premises, defendant informed plaintiff that it could save a considerable amount of money compared to Con Edison Rates as defendant would provide electricity at the real time market rate (hereinafter "Real Time Market Rate").

- 8. That the plaintiff to its detriment, relied upon the warranties and representations made by the defendant and entered into the Services Agreement and simultaneously entered into contracts with its own customers utilizing defendants' Services Agreement as a basis to determine its current and future cost basis.
- 9. Plaintiff entered into simultaneous contracts with its own customers which contracts were calculated at a lower charge for plaintiff's services than it would have charged had it known the true state of facts, that defendant's representation s were false because plaintiff was purchasing power at a higher rate than it had warranted and represented by the defendant.
- 10. That at the time of the execution of the Services Agreement, Exhibit "A' annexed and prior thereto, and as a part thereof, and to induce the plaintiff to enter into the Services Agreement, Exhibit "A" annexed, the defendant falsely and fraudulently stated and represented to plaintiff that the price to be charged to plaintiff would be NYISO "real time" LBMP plus a fixed profit margin for defendant.
- 11. Further, at the time the plaintiff entered into the Services Agreement defendant knew and concealed from the plaintiff the fact it did not have a program to provide power at the NYISO "real time" LBMP, plus a fixed profit margin for defendant within the State of New York, nor did the defendant service any "real time" LBMP in the New York area.
- 12. The defendant in fact also materially misrepresented to plaintiff that it serviced accounts in the New York Area with the NYISO "real time" LBMP, because such representation was false when made and known by the defendant to be false and intended when made by defendant to induce plaintiff to enter into Exhibit "A" annexed, the "Power Supply Coordination Services and Electricity Agreement.

- 13. That the defendant promised plaintiff that billing would have 720 line items, each one representing one hour of the monthly rate, and be based upon NYISO "real time" LBMP.
- 14. That the plaintiff however received billings with single line item amount, not the 720 line items, each one representing one hour of tie monthly rate as had been promised by the defendant to induce plaintiff to enter into the contract.
- 15. That heretofore, the plaintiff requested that defendant provide a "Corrected Bill" one that was in conformity with the terms of the contract, Exhibit "A" annexed, with back up documentation providing the 720 line items along with billing rate and Power usage for the time period being billed.
- 16. That after the passage of ten (10) months from commencement of the term of the contract, Exhibit "A" annexed, plaintiff's calculations established the fact that defendant's representations and warranties to induce plaintiff to enter in the contract were false when made, because defendant's bills were not less expensive than Con Edison but in fact, more expensive.
- 17. That the plaintiff expended substantial time and resources to review such initial ten (10) months of billing and subsequent nine (9) Months, of billing and learned thereby that defendant had for each of those nineteen (19) months provided fabricated billing data, in order to make the amounts reconcile with its single line item monthly bill, resulting in substantial overpayments by the plaintiff over the contracted for rate agreed to in Exhibit "A" annexed, the parties' Services Agreement.
- 18. That the plaintiff made good faith efforts to resolve amicably the issue of the overpayments caused by fabricated billing data and to have the defendant recalculate the correct sum plaintiff would have-owed had the defendant billed it in conformity the terms of the contract Exhibit "A" annexed, to wit: the parties' Services Agreement.

- 19. That the amount owed the defendant in accordance with express terms of the Exhibit "A" annexed, the parties' Services Agreement is substantially less than the sum calculated by the defendant and may be less than the sums already paid the defendant by the plaintiff
- 20. Plaintiff's complaint seeks damages from the defendant of \$1,350,000 because the representations so made were known by the defendant to be false when made and were made with intent to deceive and defraud the plaintiff and to induce it to enter into Exhibit "A", the "Power Supply Coordination Services and Electricity Agreement" for its business premises.
- 21. This suit was commenced because it was the defendant that owed the plaintiff money, not the other way around.
- 22. The complaint and extensive written documentation exchanged with the defendant's employees, before and after the contract, Exhibit "A" annexed was executed clearly establish the existence of a meritorious cause of action in favor of plaintiff. As a matter of judicial discretion, plaintiff should be afforded an opportunity to present this case in court so that a fair and just resolution of this matter can ultimately be reached.

DEFENDANT CANNOT CONTINUE IN THE CASE; MUST BE SUBSTITUTED OUT AS A PARTY DEFENDANT AS IT NOT A REAL PARTY IN INTEREST

- 23. Plaintiff's attorney will provide his own declaration about the impact of Certain Federal Rules including the need for Joinder of the Real Party in Interest.
- 24. Such attorney not the deponent will provide legal argument for the Court. Factually, deponent understands that that once defendant Strategic was sold, it has no further standing in this Case and must be substituted out of the case.

25. Plaintiff's attorney informs the Court, by means of Exhibit "B" annexed to this Affidavit, his Reply Declaration in support of the plaintiff's motion-in-chief to remand, which provided documentation that Strategic lacked standing in this case after April 2, 2008, once Strategic was sold for 300 Million Dollars and replaced by both Direct Energy Service LLC located in Toronto, Canada and its parent, Centrica PLC located in the United Kingdom; Strategic was no longer entitled to have the Court decide the merits of the dispute.

CONCLUSION

- The motion to dismiss should be denied as the plaintiff has established 26. from the complaint and extensive written documentation exchanged with the defendant's employees, before and after the contract, Exhibit "A" annexed was executed that there exists a meritorious cause of action in favor of plaintiff.
- 27. The plaintiff's attorney in a separate declaration will deal with the legal issue that there must be a substitution of parties and Strategic cannot continue to act before this Court because it no longer is the real party in interest.

/s/ Lee S. Weinstein Sworn to before me this 26th day of August, 2008 LEE S. WEINSTEIN /s/ Deborah Lee Deborah Lee Notary Public State of New York

EXHIBIT 'A'
"Power Supply Coordination Services arid Electricity Agreement"

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PowerSupply Coordination® Service Agreement New York **LBMP Product**

(888) 925-9115

This PowerSupply Coordination Service Agreement is made as of Hovember 08, 2005 by and between Strategic Energy L.L.C. ("Strategic Exergy") and Xand Corporation ("Buyer"). The PowerSupply Coordination Service Agreement together with all Exhibits shall collectively be referred to as the "Agreement."

Strategic Energy agrees to provide PowerSupply Coordination Services and Electricity ("Service") to most Buyer's full usage requirements of Buyer's Facilities and Buyer's full usage requirements of Buyer's Facilities. PowerSupply Coordination Services and Electricity to meet Buyer's full usage requirements at the Buyer's Facilities. PowerSupply Coordination ("PSC") Services are the services provided by Strategic Energy in accordance with the Company's posicies and procedures, in selecting the optimum mix of Electricity supplies to match the Facility load. The Electricity provided Under this Agreement shall be Firm, subject to Force Mejeure.

Z. Tem:

This Agreement study be effective upon execution by both parties and continue for the ported of mentite identified in the Fockly List, which is attached hereto as Exhibit A. Strategic Energy strait are its best affects to immediately commence Service in the start mentite as an both palars. However, Boyer acknowledges that the commencement of Service hyperender upon confirmation by the Host itality of the completion of all required annothent processes. At the and of the Term, if he Buyer and Strategic Energy have not enhanced into any written modification, amendment or renewal of this Agreement and it Buyer has not elected to other service from another provider of electricity, this Agreement shall strainable by continue on a year-to-year basis (Yearly Renewal') until terminated by either party sons black (SO) are notice to the other party. upon thirty (50) say notice to the other party.

3. Service Options and Price:

- 31. In order to supply Buyer's full usage requirements for the Term of this Agreement, the Enthby component of Buyer's Electricity requirements shall be mell with Energy from the ISO ("NY ISO") Real Time LEMP and Buyer will pay Sinetapic Energy the NY ISO Real Time LEMP, plus applicable doubt and hose as set term in this Agreement. BY EXECUTION OF THIS AGREEMENT, BUYER ACKNOWN, EDGES THAT THE NY ISO REAL TIME LEMP MARKET ISA CONSTANTLY FLUCTUATING MARKET PRICE AND THUS THE LEMP WILL VARY. CUSTOMER ASSUMES ALL RISKS OF PRICE MOVEMENTS AND AGREES TO PAY FOR THE SERVICES PROVIDED IN ACCORDANCE WITH THIS AGREEMENT.
- 3.2 Price: The total coal to be paid by Buyer for the Services provided under this Agreement shall include the applicable costs and fees for the following components: Energy, Capacity, Transmission, Anothery Services, If any, losses, of costs associated with Strategic Energy's obligation to provide capacity as required by the New York ISO (Installed Capacity Costs), Congestion, as applicable, great records take all sales bases, transactional taxes or other governmental or regulatory imposed taxes to surcharges to which Buyer may be subject and the PSC Services Fee.
- 3.3. PSC Services Pee: The PSC Services Fee is 0,033 contains a second hour for each kilomate nour of Electricity provided under this Agreement.
- 3.4 Third Party Costs: Buyer acknowledges that any costs accessed by any third party for the provision of service heavendar, including but not littled to switching and meter related costs, are not transited in the price for any Service provided hereunder and what he the responsibility of Buyer.

Buyer will receive from Strategic Energy a monthly invoice following their mercented date for Services provided under this Agreement. Strategic Energy and Buyer agree upon the following condition regarding to monthlerval monthly mean accounts, if any Strategic Energy will deapprepare the Buyer's uracy and Buyer agrees to account the results of this deapprepare as its houry pulling determinants. Payment-in-full is due 20 calendar days from the date of the invoice. If Buyer fails to read payment is his in any month, impreed will be assessed on the tate belong up an interest read that the payment in the highest rate. allowed by law.

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In any month Strokegic Energy may provide estimated charges for to fishicast components upon the bill, which shall then be reconciled with actual information within a commercially reasonable time from the recipit of the actual usage or other partnersholding information. If Buryar's Enclisives has any interest motors, Buryar's action/viorages that the usage information for each motor such mater reads. If Buryar's from that completed upon the Host Dutty bill as a result of different billing syclas being unfibent for shote mater reads. If Buryar's has Fedibles with officing the read dates and Buryar chooses to receive ones consolidated bill for all Fedibles, Shategic Energy may choose the bay of the imports on which to deliver a bill to Buryar. No adjustments or corrections shall be reade to any amount billed after the larger of beauty-loss (24) months from the crass of line off or the time from powerfact by the Host Diffyry's tariff for adjustments in Company and party shall have the right, at its sole expense and upon two written notice, to examine the records of the other party to verify the accuracy of any assistanced, charge, notice or computation made pursuant to this Agreement.

Strategic Energy may request that Buyer provide financial information sufficient for Strategic Energy to complete a credit review prior to providing Service horsunder. It, prior to commercing Service or at any time during the Form of this Agreement, Shrategic Energy has good fish concerns about the credit worldness of Suyer or Suyer's shifty to perform humander, Shrategic Energy has good provide previde previde previde previde previde provide provide provide provide or an amount said in a form determined by Sarategic Energy in a commercially reasonable manner, including but not limited to, an excrew account, deposit, letter of credit, parents/guarenty, or surely bond. If such credit assurance is not provided within seven (7) days of being requested by Strategic Energy, then Strategic Energy may technolo this Adressment without any additional regice. Agreement vathous any soditional nuites.

The Agreement may be terminated at any time after the date hereof, (f) by mutual consent in whiting by the parties, or (i) by either party if there have been a foliure to perform or modeled interapresents then or breach of warrantly, coverant or condition and such folius or breach is not sund within bronty-five (25) calender days of the defaulting party's receipt of written notice from the non-deputing party, or (iii) during a Yearly Renewal pursuant to Paregraph 2 above, by either party upon providing the other party with thirty (30) days prior written notice.

in the event of termination, all further obligations of the parties under this Agreement shull terminate without further liability of the parties, except for the payment by the owing party of any sums due and owing to the case party for Services rendered part to the larmination date, any direct extual damages, any indemnification or confidentially obligation of either party which has arised the instrumental and any other obligation becounder which by its nature survives the instrument of the Agreement.

7. Lord Change Information:

Buyer shall give Strategic Energy at least thirty (30) days noted ("Notice of Load Change") prior to removing a Pacitity from Service helaunder as a result of cassing operations at such Facility.

It cleaned in Law or Regulation:

If, during the Term of this Agreement, regulatory changes shift costs from the Bost Utility to Strategic Energy or from Strategic Energy to the Host Utility, then such notice of credits will be passed throughout the Buyain. If any laws, orders or regulations are present, modified, implanmented or interpreted by judicial or regulatory entering highlative armothering, which creates attritional costs not currently includes in the Price or increases in the cost companies of the Price (the "Incremental Charges), then Strategic Energy shalf pass through such incremental Charges to be part by Buyas source Jet Price, Buyar may, after receiving motion that Strategic Energy intended to pass through incremental Charges) pursuant to this Section, provide Strategic Energy with thirty (30) days notice of terminate materials of the Agreement. Upon templication, all further obligations of the particular under this Agreement shall terminate waters further fability of the partice, except for the payment by the orders party of any sums due and owing to the other party for Barkets rendered prior to the termination day, any direct actual demands on by Strategic Energy (which shall mean the positive difference, if any, between the Price and the current makes note to the Term (based upon the anticlosist usage), any instemplication or confidentiality obligation of extern party which has a rising harvander and any other obligation hereunder which by its patters survives the termination of this Agreement.

9. Agreemont to IndomeDy:

Subject to the findations set forth herein, each party shall detend, indemnify and food hermides the other party, as affiliates and their respective employees. Officers, or agents from any and all plants, labelity and expense acting out of any bodily injury, death or demand to property foliar than bodily injury, death or demands to property foliar than bodily injury, death or demands to property foliar than bodily injury, death or demands to property provided by the anglepinon or attentional misconduct of any such other party or its sevenile or employees.

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10. Limitation of Liability:

Liability is limited to direct actual camages as the sold and exclusive remedy and all other remedies or damages are expressly waried in no event shall either party be liable to the other for any incluental, consequental, or plinity damages, lost profits or other business interruption damages, each party agrees that it has a birty to intrate damages and coverants that it has a birty to intrate damages and coverants that it will use commercially reasonable exports to minimize any damages it may wour as a result of the other party's performance or non-performance of this agreement.

11, Applicable Law:

As to all moders of construction and interpretation, this Agraement shall be construed, interpreted, and governed under and by the laws of the State of New York, without regard to its choice of the provisions.

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No waives by either party of any default or defaults by tre-other party under this Agreement shall operate as a waiver of any future default, whicher of a like or different character or nature.

11. Serecability:

The various provisions of this Agreement are severable. The treatedly, diagnity or unantercognitly of any portion or provision shall not affect the validity, highests or enforces thirty of any other portion on provision of this Agreement.

14, Notices and Correspondence:

Any notice at other document to be given or served hereunder or under any document or instrument executed pursuant hereto shall be in writing and shall be delivered to the appropriate address specified below. Notice sent by faccimin or other electronic means shall be deemed to have been recoived by the close of the business day on which it was transmitted or such a star time as is confirmed by the receiving party. Notice delivered by opurier shall be deemed to have been received on the business day after it was sent or such earlier time as is confirmed by the receiving party. Notice delivered by new been received by the receiving party. Notice delivered by new been received at the end of the third business day after the date of making by prepaid first class mall, except that when there is a parket alleging delivery of must, all notices shall be delivered by courier or by factionic or other electronic means.

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AWII: Customer Service Manager
Two Gelaway Certor
Pittaburgh, PA 15222
Phone: [412) 394-5500
Fax: (412) 544-3211
Mondey through Friday from
8:00AM Intrough 5:00PM Eastorn Time

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11: Skyline Or
Hawthome, NY 10532
Prona: (914) 592-9282
Fax: (914) 592-3482

15. Confidentiality:

Except when discourse may be required by law or a party has obtained written to ensent from the other party, each party agrees that it shall not effective to a little party (other shall be party); employees, landers, counsel, consuments, agence or accountants who have approed to keep such terms confidential) and will maintain in street confidence the terms, conditions and prioring information say forth and made a part of this Agreement; Strategic Energy agrees that such confidential treatment shall extend to fluyer's usage and consumption date which is not obtained in the public domain and which will not by disclosed accept as appropriate to carry out the terms of this Agreement or as requested in writing by the Bigur. The parties asked to another of the provision shall survive the terms and the formal for a period of two (2) years.

16, Representations and Warranties:

As a material inducement to entering into this Agreement, each party, with respect to itself, hereby represents and warrants to the other party as follows:

(a) it is only expanised, validly existing and in good standing under the lows of the jurisdiction of its formation and is qualified to conduct its business in those jurisdictions necessary to perform this Agreement.

(b) the execution and delivery of this Agreement see within its powers, have been buty authorized by all necessary actions and/or board approvate, and to not violate any of the terms or conditions in its governing commants or any exercise to which it is a purp or any lew applicable to a:

(c) as of the date of Service commandement hereunder, it shall have all regulatory surrorizations necessary for it to legally perform its operations;

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(d) this Agreement constitutes a legal, valid and biriding obligation of such party enforceable agreems a in accordance with its latins, audiced to bankruptcy, implivency, teorganization, and other lave property of city in the party in the party in the condition of the other bankruptcy, implication of the other width property and other width property in the city of the city o

(e) there are no transmistory, involvency, recognitization, receivership of other strotter proceedings pending or buing contamplator by a or, to its knowledge, threatened addings it is a process of the knowledge.

(f) the Facility(ies) to be provided the Services described hardle are not contractually bound by another agreement for Electricity services that will overlap with the Term stated in Facility List and

(g) If it is a property management company acting on behalf of the owner of the Facility(ise), it has the authority to execute and bind the Facility(ise) to this Agrooment for the Term ≤inted in the Facility List and that the common of its property management agreement with the twent of this Agreement.

Each perty covenants that it shall counce its tempocalive representations and warrantes to remain true and correct throughout the Yerm of the Agreement

17. Farties, Azalanmenti

This Agreement shall have to and benefit the parties herelo and their parmided aucreasors and assigns. Neither porty may assign this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld. Notwithstanding the above, Strategic Energy may, without the parsens that he are an obligations hereuped for the lented purpose of securing tradit and Spanding. Further, either party may, without the need for consent from the other party manafer or assign this Agreement (a) to an Aritisto of such party provided that sid the persons obligated to fulfill the passing party's obligations under the Agreement before the assignment, or (b) to any person or analy successfully to substantiality all of the sessignment are provided, however, that any such assignment all gree to or analy successfully the conditions hereof. As used herein, "Affacts" shall mean with respect to any portion, any other person (other than an individual) that, directly or redirectly, stratish on or more than affacts, and the directly of the controlled by, or is under common control with, such person. For purposes of the largeoing deficitions, feather means the direct or indirect ownership of more than they person (30%) of the outstanding capital stack or other southy interests having ordinary voting power.

18. Porza Majeure:

To the extent either party is prevented by Force Majaura from carriers but, in whole or part, he obligations under this Agreement and such serty (the "Claiming Party") gives notice and details of the Force Majaura to the other party as soon as practicable, then the Claiming Party shall be excused from the performence of its obligations. The Claiming Party shall be excused from the performance of its obligations for the resume performance of its obligations to the course of the performance of its obligations to the Claiming Party excused by Force Majaura.

18. DelloHons:

As used herein, unless the context clearly indicates otherwise, the following tenins shall have the meaning set form below:

"Anoillary Services"

means wholesale electric services and products requires to faciliate delivery of Energy to the Host Uliny.

"Capacity"

means the ability to provide Energy as modeled, as measured in knowns (kW) or magawards (MW).

"Distribution"

means all delivery service for Energy. Capacky and applicable Ancillary Services provided by the Host Utility, excluding Transmission.

"Einotricky"

means the carbination of Energy, Capacity, Transmission, and Ancillary Services which are provided by Stretegic Energy under this Agreement. Binstagic Energy will deliver the Electricity to the Host Utility for delivery to Bityer's Facilities.

"Energy"

means electrical energy, as measured in kilowell hours (kWh) or megawell hours (MWh).

"Facility (les)"

means the plants, works, operations end/or lacities for which Blyer has the authority to purchase Electricity under this Agreement and which are set forth on the "Facility List" attached to this Agreement as Exhibit "A", as may be amended from time to hims.

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EXHIBIT 'B'
Arthur Morrison's Reply Declaration and also in Further Support of the Plaintiff's Motion-in-Chief to Remand,

Arthur Morrison Bar Code (AM5678) Office and PO Address 11 Skyline Drive Hawthorne, New York 10532 (T) 914-592-8282 (F) 914-592-3482 Attorney for Plaintiff Xand Corporation

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

XAND CORPORATION,

Case# 08-Civ. 0513(SCR)

Plaintiff,

Judge Robinson

-Against-

Plaintiff's Reply in Support of Motion to Remand

STRATEGIC ENERGY, LLC

Defendant.

State of New York) ss:

County of Westchester)

Xand Corporation ("Plaintiff") by its attorney Arthur Morrison ("Morrison") respectfully submits this Reply Declaration in further support ("Reply") of the motion to remand ("the Motion").

I. Preliminary Statement

Plaintiff seeks to remand this case to state court because there is an absence of Federal Subject Matter Jurisdiction.

Defendant has removed to this Court a pending action in the Supreme Court, Westchester County under 28 U.S.C. 1441(a).

Change of Circumstances Mandates Rule 17 of the Federal Rules

Rule 17(1) of the Federal Rules provides that "An action must be prosecuted in the name of the real party in interest."

Plaintiff has provided overwhelming documentary evidence that Strategic is not the real party in interest in this case after April 2, 2008 negating its Removal Application of February 2008, filed with the Clerk of this Court two months earlier.

In its Motion to Remand, plaintiff provided documentary evidence mooting the Defendant's Notice of Removal and its supporting affidavit by Carl W. Boyd sworn February , 2008 ("Boyd Affidavit" and/or "Affidavit Supporting Removal").

Mr. Boyd's affidavit asserted that the defendant Strategic Energy LLC's ("Strategic's") " ...employees and any independent contractors associated with Strategic take their direction, management and control from corporate headquarters in Pittsburgh functioning as the principal place of business for Strategic." (Emphasis supplied)

A material change in circumstance did occur on April 2, 2008 when Great Plains Energy, Inc. ((NYSE:GXP) ("Great Plains") which had owned Strategic, sold Strategic for 300 Million Dollars to Direct Energy Service LLC ("Direct Energy") located in Toronto, Canada. (Emphasis supplied)

Direct Energy is a subsidiary of Centrica PLC (LSE: CAN), (Centrica) PLC located in the United Kingdom and said to be one of the word's largest integrated energy companies. (Emphasis supplied)

ARGUMENT:

(1) Rule 17 (3) Need for Joinder of the Real Party in Interest.

"The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest."

Strategic's Opposition to the plaintiff's motion to remand does not address Rule 17(1) of the Federal Rules provides that "An action must be prosecuted in the name of the real party in interest." or Rule 17(3) of the Federal Rules involving the issue of joinder of the real party in interest, raised by Plaintiff in its Motion in Chief, because in order to establish diversity the Court must have before it the true parties in a case, and further if not named originally, then Rule 17(3) of the Federal Rules provides that there must be a reasonable process to join, ratify or substitute them into the action.

Firstly, the documentary evidence provided the Court in the motion in chief, is not disputed by Strategic counsel's opposition to remand, namely the sale of Strategic in April 2, 2008 by Great Plains Energy for 300 Million Dollars to Centrica PLC located in the UK to be operated by Centrica PLC's subsidiary, to Direct Energy Service LLC which is located in Toronto, Canada or further, such sale in April, 2008 totally nullifies Strategic's February, 2008 Removal Application, by failing to satisfy the complete diversity requirements determined by Statute, 28 U.S.C. 1332 (c)(i). Declarant's moving papers detail this issue, including a Memorandum and the arguments need not be repeated hereat.

As no challenge is made by Strategic's counsel to Exhibits "A","B" and "C" annexed to the Notice of Motion to remand, the documentary evidence of the sale of Strategic on April 2, 2008, Strategic's headquarters in Pittsburgh, Pa is no longer relevant

as an exclusive standard for diversity requirements as determined by Statute, 28 U.S.C. 1332 (c)(i).

Plaintiff's declaration and Memorandum, heretofore filed with the Court respectfully submits that diversity for Federal Jurisdictional Purposes is determined by Statute, 28 U.S.C. 1332(c) (i) which provides that a corporation is "a citizen of any state by which it has been incorporated and of the state where it has its principal place of business"

If in fact Great Plains Energy, Inc. which previously owned Strategic sold Strategic on April 2, 2008 for 300 Million Dollars to Direct Energy Service LLC located in Toronto, Canada, Direct Energy being a subsidiary of Centrica PLC located in the United Kingdom, then this new April 2, 2008 dynamic as to the "real parties in interest" impacts immediately Rule 17(1) of the Federal Rules which provides that "An action must be prosecuted in the name of the real party in interest." in this case and thereby irrevocably cancels the factual basis for diversity asserted by Strategic's original February 2008 set of facts presented in its Notice of Removal to Judge Robinson.

At this point in time, August, 2008 Rule 17(3) of the Federal Rules must be taken into consideration by Justice Robinson as by statute, there must be a reasonable process to join, ratify or substitute the real parties in interest into the action, namely

- (i) Direct Energy Service LLC located in Toronto, Canada, (Direct Energy being a subsidiary of Centrica PLC) and
 - (ii) Centric PLC itself located in the United Kingdom.

As diversity is governed by statute, 28 U.S.C. 1332(c)(i) which provides that a corporation is "a citizen of any state by which it has been incorporated and of the state where it has its principal place of business both Direct Energy Service LLC located in Toronto, Canada and its parent, Centrica PLC located in the United Kingdom the real parties in interest must be joined as the real parties in interest and then diversity determined.

(2) Strategic Being Sold has no Further Standing in this Case

Plaintiff's motion in chief provided the case law that Strategic lacked standing after April 2, 2008, once Strategic was sold for 300 Million Dollars and replaced by both Direct Energy Service LLC located in Toronto, Canada and its parent, Centrica PLC located in the United Kingdom; once sold Strategic was bound by Rule 17(1) of the Federal Rules which provides that "An action must be prosecuted in the name of the real party in interest." Not being the real party in interest after April 2, 2008, Strategic was no longer entitled to have the Court decide the merits of the dispute or of the particular issues.

Strategic's Opposition did not provide any case law authority to challenge this postulate and it is respectfully submitted, it lacks standing to continue as a party in this case after April 2, 2008.

Conclusion

Citizenship for diversity purposes is determined by statute, 28 U.S.C. 1332(c)(i) which provides that a corporation is "a citizen of any state by which it has been incorporated and of the state where it has its principal place of business".

Before the Court can reach the issue of the applicability of Strategic's Citizenship for diversity purposes as determined by statute, 28 U.S.C. 1332(c)(i), Strategic in August, 2008 must make out a prima facie showing to ensure that it has Standing to met the

challenge presented by Rule 17(1) of the Federal Rules which provides that "An action must be prosecuted in the name of the real party in interest."

Additionally, Strategic's Opposition to the plaintiff's motion to remand does not address Rule 17(3) of the Federal Rules, where by statute, there must be a reasonable process to join, ratify or substitute the real parties in interest into the action, namely (i) Direct Energy Service LLC located in Toronto, Canada, (Direct Energy being a subsidiary of Centrica PLC) and (ii) Centric PLC itself located in the United Kingdom

In order to establish diversity, and pass upon the merits of the motion to remand the Court must have before it the true parties in a case, and further if not named originally, then Rule 17(3) of the Federal Rules provides that there must be a reasonable process to join, ratify or substitute them into the action. That process has not yet occurred.

Plaintiff respectfully submits, that the Removal Application cannot proceed, in the absence of (i) Direct Energy Service LLC located in Toronto, Canada and (ii) Direct's parent, Centrica PLC located in the United Kingdom.

Plaintiff also respectfully submits that Strategic's counsel must provide a current Rule 7.1 Statement executed by defendant's counsel to replace the one filed on January 18, 2008. The April 2, 2008 sale mandates the need for such Rule 7.1 Statement Amendment

Plaintiff also respectfully submits that Strategic's counsel must provide a representation to the Court if Strategic transferred customer files after April 2, 2008 based upon the actions of its parent, Great Plains Energy, Inc. of Kansas City, Mo. in selling the assets of Strategic for 300 Million Dollars in April 2008.

RESPECTFULLY SUBMITTED,

Dated: Hawthorne, New York /s/ Arthur Morrison August 15, 2008

Arthur Morrison Attorney for Plaintiff Office and PO Address 11 Skyline Drive Hawthorne, New York 10532 (T) 914-592-8282 (F) 914-592-3482

Filed 08/27/2008

DECLARATION OF SERVICE

Arthur Morrison pursuant to 28 U.S.C. § 1746, declares under penalty of perjury as follows:

That on August 15, 2008 I caused the annexed Notice of Motion to be served on:

> Thomas M. Bona, P.C. Attorney for Defendant Office and P.O. Address 123 Main Street White Plains, New York 10601 (T) 914-428-1438 (F) 914-428-1313

by depositing a true and correct copy thereof, properly enclosed in FedEx Priority Overnight wrapper, directed to said law firm at the address within the State designated by them for that purpose and/or in accordance with the Southern District's Rules and also faxed a copy to 914-428-1413.

RESPECTFULLY SUBMITTED,

Dated: Hawthorne, New York August 15, 2008

/s/ Arthur Morrison

MEMORANDUM FAX TRANSMISSION & Priority Overnight

Arthur Morrison Attorney for Plaintiff Office and PO Address 11 Skyline Drive Hawthorne, New York 10532 (T) 914-592-8282 (F) 914-592-3482

To:

Thomas M. Bona, P.C. Attorney for Defendant Office and P.O. Address 123 Main Street White Plains, New York10601 (T) 914-428-1438 (F) 914-428-1313

Hawthorne, New York

August 15, 2008

Re:

Reply Declaration

Enclosed please find the Reply Declaration of the Plaintiff.

Arthur Morrison Bar Code (AM5678) Office and PO Address 11 Skyline Drive Hawthorne, New York 10532 (T) 914-592-8282 (F) 914-592-3482 Attorney for Plaintiff Xand Corporation

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

-----X

XAND CORPORATION,

Case# 08-Civ. 0513(SCR)

Plaintiff, Judge Robinson

-Against-

Plaintiff's Declaration & Memorandum in Opposition to Motion to Dismiss

STRATEGIC ENERGY, LLC

Defendant.

State of New York)

) ss:

County of Westchester)

Xand Corporation ("Plaintiff") by its attorney Arthur Morrison ("Morrison") respectfully submits Plaintiff's Declaration & Memorandum in Opposition ("Opposition") to Motion to Dismiss ("the Dismissal Motion").

Preliminary Statement Failure to Join a Required Party

1. Unexplained by the defendant Strategic, in proceedings to (a) remove this case from the Supreme Court, Westchester County and (b) the subsequent application to Remand, why Strategic has not joined required parties.

- 2. Under Rule 19 (c) Strategic, aware of the fact that (i) Direct Energy Service LLC located in Toronto, Canada, (Direct Energy being a subsidiary of Centrica PLC) and (ii) Centric PLC itself located in the United Kingdom are respectively the successors since April, 2008 of Strategic by virtue of a 300 Million Dollar sale, is obligated to provide to this Court, a Statement of Reasons for Omitting a Party.
- 3. It appears from the Defendant's Opposition to the Motion to Remand that Strategic's counsel did not deal with the requirements of Rule 19(a) that if Strategic is taking the position before Judge Robinson that Direct Energy Service LLC located in Toronto, Canada, (Direct Energy being a subsidiary of Centrica PLC) and (ii) Centric PLC itself located in the United Kingdom need not be named and made a party under Rule 19(a), then Strategic must include such statement in accordance with Rule 19(c) and provide reasons to the Court therefor.

Does the court have jurisdiction over the joined party?

- 4. Once Strategic's counsel deals with Rule 19(c) the Court can rule on jurisdiction and diversity requirements when it is urged by defendant Strategic that the basis of original jurisdiction is diversity.
- 5. At this point, plaintiff will restate its position, provided earlier in its Motion to Remand, that it seeks to remand this case to state court because there is an absence of Federal Subject Matter Jurisdiction. Defendant had removed to this Court a pending action in the Supreme Court, Westchester County under 28 U.S.C. 1441(a).

Change of Circumstances Mandates Rule 17 of the Federal Rules

Rule 17(1) of the Federal Rules provides that "An action must be 6. prosecuted in the name of the real party in interest."

- 7. In its Motion to Remand, Plaintiff has provided overwhelming documentary evidence that Strategic is not the real party in interest in this case after April 2, 2008 negating its Removal Application of February 2008, filed with the Clerk of this Court two months earlier.
- 8. In its Motion to Remand, plaintiff provided documentary evidence mooting the Defendant's Notice of Removal and its supporting affidavit by Carl W. Boyd sworn February ____, 2008 ("Boyd Affidavit" and/or "Affidavit Supporting Removal").
- 9. Mr. Boyd's affidavit asserted that the defendant Strategic Energy LLC's ("Strategic's") " ...employees and any independent contractors associated with Strategic take their direction, management and control from corporate headquarters in Pittsburgh functioning as the principal place of business for Strategic." (Emphasis supplied)
- 10. A material change in circumstance did occur on April 2, 2008 when Great Plains Energy, Inc. ((NYSE:GXP) ("Great Plains") which had owned Strategic, sold Strategic for 300 Million Dollars to Direct Energy Service LLC ("Direct Energy") located in Toronto, Canada. (Emphasis supplied)
- 11. Direct Energy is a subsidiary of Centrica PLC (LSE: CAN), (Centrica) PLC <u>located in the United Kingdom</u> and said to be one of the word's largest integrated energy companies. (Emphasis supplied)

ARGUMENT:

(1) Rule 17 (3) Need for Joinder of the Real Party in Interest.

"The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest."

- 12. Strategic's motion to dismiss does not address Rule 17(1) of the Federal Rules provides that "An action must be prosecuted in the name of the real party in interest." or Rule 17(3) of the Federal Rules involving the issue of joinder of the real party in interest, raised by Plaintiff in its Motion in Chief, because in order to establish diversity the Court must have before it the true parties in a case, and further if not named originally, then Rule 17(3) of the Federal Rules provides that there must be a reasonable process to join, ratify or substitute them into the action.
- 13. Declarant repeats the arguments made in Support of the Motion to remand, the documentary evidence provided the Court is not disputed by Strategic counsel's, namely the sale of Strategic in April 2, 2008 by Great Plains Energy for 300 Million Dollars to Centrica PLC located in the UK to be operated by Centrica PLC's subsidiary, to Direct Energy Service LLC which is located in Toronto, Canada or further, such sale in April, 2008 totally nullifies Strategic's February, 2008 Removal Application, by failing to satisfy the complete diversity requirements determined by Statute, 28 U.S.C. 1332 (c)(i).

Strategic Being Sold has no Further Standing in this Case

- 14. Nor has Strategic offered any opposition to the case law that Strategic lacked standing after April 2, 2008 as a real party in interest, once Strategic was sold for 300 Million Dollars and replaced by both Direct Energy Service LLC located in Toronto, Canada and its parent, Centrica PLC located in the United Kingdom.
- 15. Nor has Strategic provided persuasive authority to counter the fact that once sold, Strategic was bound by Rule 17(1) of the Federal Rules which provides that " An action must be prosecuted in the name of the real party in interest." Not being the real

party in interest after April 2, 2008, Strategic was no longer entitled to have the Court decide the merits of the dispute or of the particular issues.

Conclusion

- 16. Strategic lacks standing to continue as a party in this case after April 2, 2008.
- Strategic's does not address Rule 17(3) of the Federal Rules, where by 17. statute, there must be a reasonable process to join, ratify or substitute the real parties in interest into the action, namely (i) Direct Energy Service LLC located in Toronto, Canada, (Direct Energy being a subsidiary of Centrica PLC) and (ii) Centric PLC itself located in the United Kingdom
- 18. Plaintiff also respectfully submits that Strategic's counsel must provide a current Rule 7.1 Statement executed by defendant's counsel to replace the one filed on January 18, 2008. The April 2, 2008 sale mandates the need for such Rule 7.1 Statement Amendment

RESPECTFULLY SUBMITTED,

Dated: Hawthorne, New York August 26, 2008

Arthur Morrison /s/

> Arthur Morrison Attorney for Plaintiff Office and PO Address 11 Skyline Drive Hawthorne, New York 10532 (T) 914-592-8282 (F) 914-592-3482

Declaration of Service

Arthur Morrison, pursuant to 28 U.S.C. Section 1746 declares under the penalty of perjury as follows:

That on August 26, 2008 I caused the annexed Affidavit of Lee S. Weinstein, Declaration of Arthur Morrison and Exhibits to be served on:

Thomas M. Bona, P.c. Attorney for Defendant Office and P.O. Address 123 Main Street White Plains, New York 10601 Tel 914-428-1438 Fax 914-428-1313

By depositing a true copy thereof, properly enclosed in a FedEx wrapper, directed to said law firm at the above address in the State of New York, designated by them for that purpose and in accordance with the Southern District's Rules.

Respectfully submitted,

Dated: Hawthorne, New York August 26, 2008

/s/ Arthur Morrison